LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 7 1968
JOHN F. DAVIS, CLERK

In the Supreme Court
of the United States

OCTOBER TERM, 1967
No. 972

JACQUES ARLEY and
CHARLOTTE ARLEY,
Petitioners,

v.

UNITED PACIFIC INSURANCE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT UNITED PACIFIC INSURANCE COMPANY IN OPPOSITION

KENNETH E. ROBERTS
12th Floor, Standard Plaza
Portland, Oregon 97204
Attorney for Respondent United Pacific Insurance Company

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-68

SUBJECT INDEX

	Page
Citations to the Opinion Below	1
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Denying the Writ:	
Introduction	7
I—The Federal District Court correctly decided all issues of law in compliance with Oregon Jurisprudence	7
II—The Federal District Court and the Ninth Circuit adhered to customary, recognized judicial procedure	15
Conclusion	18

TABLE OF AUTHORITIES

Page

TABLE OF CASES

Alliance Insurance Co. v. Continental Gin Co., 285 S.W. 257 (Tex. Comm. App. 1926) 13

American Fire Insurance Company v. King Lumber and Manufacturing, 250 U.S. 2, 39 S. Ct. 431, 63. L. Ed. 810 (1919) 14

Celina Mutual Casualty Company v. Baldridge, 313 Ind. 198, 10 N.E.2d 904 (1937) 12

Clark v. Insurance Company of North America, 89 Me. 26, 35 A. 1008 (1889) 13

Di Giovanni v. Camden Fire Insurance Association, 296 U.S. 64, 56 S. Ct. 1, 80 L. Ed. 47 (1935) 17

Enlow v. New York Life Insurance Company, 293 U.S. 379, 55 S. Ct. 310 (1935) 17

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 15, 17

Ernest v. State, 40 Ala. App. 344, 113 So. 2d 517 (1959) 13

Gambleman v. Mercantile Insurance Company of America, 90 F. Supp. 472 (S.D. Cal. 1950) 12

Hamacher v. Tumy, 222 Or. 341, 347, 352 P.2d 473, 496 (1960) 11

Hardwick v. State Insurance Company, 20 Or. 547, 26 P. 840 (1891) 12

Hopkins v. Phoenix Fire Insurance Company, 200 Ky. 365, 254 S.W. 1041 (1923) 12

In re Midland United Company, 141 F.2d 692 (3rd Cir. 1942) 17

Mock, et al v. Glens Falls Indemnity Co., 210 Or. 71, 80, 309 P.2d 180 (1957) 9, 13

Price v. Greenway, 167 F.2d 196 (3d Cir. 1948) 16

TABLE OF AUTHORITIES (Cont.)

Page

Rodgers Insurance Agency v. Anderson Machinery, 211 Or. 459, 468, 316 P.2d 497, 501 (1957) 11

Royal Insurance Company, Ltd. v. Smith, 77 F.2d 157 (9th Cir. 1935) 13

Russell v. Cunningham, 233 F.2d 806 (9th Cir. 1956) 17

Salquist v. Oregon Fire Relief Association, 100 Or. 416, 197 P. 312 (1921) 9

Seideman v. Hamilton, 173 F. Supp. 64 (D. Pa. 1959) 16

Sholund v. Detroit Fire & Marine Insurance Co., 172 Wash. 111, 19 P.2d 395 (1933) 13

United States Casualty Co. v. Rodriques, 288 S.W. 487 (Tex. Civ. App. 1926) 12, 13

Waterloo Lumber Company v. Des Moines Insurance Co., 158 Iowa 563, 138 N.W. 504, 506 (1912) 12

STATUTES

ORS Ch. 28 16
ORS 736.005(3)(e)(f) 2, 14
ORS 736.405 ..... 2, 19, 20, 21
ORS 736.410 ..... 2, 14, 21, 22

NRS 684.020 (4) 11
NRS 684.350 11

OTHER AUTHORITIES

16 Appleman, Insurance Law and Practice 703, § 9163 12

Restatement, Conflict of Laws § 7 (1934) 16

In the Supreme Court
of the United States

OCTOBER TERM, 1967
No. 972

JACQUES ARLEY and
CHARLOTTE ARLEY,

Petitioners,

v.

UNITED PACIFIC INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT UNITED PACIFIC INSURANCE COMPANY IN OPPOSITION

Respondent, UNITED PACIFIC INSURANCE COMPANY, opposing the issuance of a writ of certiorari, prays for denial of the petition.

CITATIONS TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is properly reported at

379 F.2d 183 (9th Cir. 1967). Petitioners' statement of jurisdiction is sufficiently accurate to be acceptable.

QUESTION PRESENTED

Whether a fact question is presented on agency for jury determination when it is asserted that a solicitor for a local agent has orally bound a fire risk in the Fall, and the solicitor does not request the issuance of the policy until after the loss in January: whether a jury question is presented on whether an insurance solicitor is an agent for a prospective insured or for an insurance company.

STATUTES INVOLVED

The only statutes involved in this action are ORS 736.005 (3) (e), (f); 736.405 and 736.410. Petitioners' Brief A-22 contains ORS 736.005 (3) (e), (f); ORS 736.405, 736.410 appear in Appendix A, supra.

STATEMENT

Petitioners' statement presents less than a complete picture and lends no weight to the findings of the jury, which were contrary to the petitioners. The Honorable John F. Kilkenny, had the petitioners not been entitled to a jury trial, would have reached an identical result (Pet. Br. 7). All conflicts in the evidence must be posited as determined adversely to petitioners by the jury.

Petitioners are husband and wife, married in 1954 (Tr. 245); petitioners owned real property near Verdi, Nevada, which was damaged by fire on January 15, 1962 (R. 53, 54). Petitioners have resided in Oregon since 1958, Mr. Arley being employed by the Montag Furnace Company in Portland (Tr. 179, 180). Mr. Arley maintained a bank account with the First National Bank of Oregon (Tr. 180), and both petitioners' cars were registered in Oregon (Tr. 180).

Mr. and Mrs. Arley became acquainted with Mr. Roger Chaney sometime in the year 1958; thereafter they obtained some of their insurance policies through him (Tr. 217). At that time, Mr. Chaney operated his own independent insurance agency and acted as agent for Insurance Company of Oregon, Standard Accident and Ohio Casualty (Tr. 59). Petitioners obtained a fire policy on the Nevada property from Mr. Chaney, which was underwritten by Standard Accident Insurance Company, effective January 28, 1958, for a period of three years. This policy was cancelled in November, 1960 (Tr. 183). From 1960 until the time of the present action, there was no insurance upon the Nevada property (Tr. 184). During this time, the petitioners had considered employing agents in Reno to secure the coverage (Tr. 184).

In 1961, Mr. Chaney's business was purchased by Larry Nelson Agency and Mr. Chaney became a solicitor for that firm (Tr. 12). The Nelson Agency represented various companies, including Insurance Company of Oregon, Western Fire of Fort Worth,

United Pacific Insurance Company (respondent) and Ohio Casualty Company (Tr. 9). The Nelson Agency did *not* take over the fire policy on the Nevada property belonging to petitioners (Tr. 12).

In mid-1962, Mr. Chaney had various conversations with Mrs. Arley (an attorney), concerning the placing of fire coverage upon the Nevada property (Tr. 66, 73, 89). Mr. Nelson advised Mr. Chaney that he could not place the coverage through the Larry Nelson Agency because the agency did not have a Nevada license (Tr. 13, 70, 121). Mr. Chaney then told Mrs. Arley that he lacked a Nevada license but that he would attempt to *broker* the insurance for her (Tr. 105). Mr. Chaney told Mrs. Arley that he would take care of the coverage, but he did not recall ever advising her of any particular company (Tr. 68, 80, 81, 90). Subsequently, Mr. Chaney made inquiry as to how he might place the insurance and share in the commission, and he called other agents and brokers regarding placing the coverage (Tr. 70, 71, 124).

On the morning of January 16, 1963, Mrs. Arley called Mr. Chaney and advised him that there had been a fire loss on the Nevada property; she inquired as to whether or not Mr. Chaney had placed insurance upon it (Tr. 73). Later that day, Mr. Chaney called Mrs. Arley back and advised her that he had placed fire insurance upon the property (Tr. 74). *In fact, Mr. Chaney had not placed insurance on the property* (Tr. 72, 73, 74, 75).

Subsequent to being advised of the loss on January 17, 1963, *Mr. Chaney submitted an application for insurance to the United Pacific Insurance Company, respondent herein. The application did not indicate in any manner that the property had been previously damaged by fire* (Tr. 76).

Thereafter, sometime in March, 1963, *petitioners received respondent's policy No. F-*78185. *At the time the policy was processed, the respondent's employees handling the application had absolutely no knowledge that the petitioners' property had been earlier destroyed by fire* (Tr. 131, 143, 151, 202). *Respondent would not have processed the application had it known of the loss* (Tr. 202).

Subsequently, on March 5, 1963, Mr. Chaney, without the knowledge of respondent, contacted Mr. Marks of General Adjustment Bureau in Reno, Nevada, to inspect the damaged premises (Tr. 167, 177).

On April 2, 1963, United Pacific Insurance Company wrote petitioners denying coverage (Pl. Ex. 56).

On April 4, 1963, *United Pacific Insurance Company filed its complaint in the United States District Court for the District of Oregon to cancel and rescind the policy* (R. 1-4), *alleging that petitioners had failed to disclose at the time of issuance that the property had been seriously damaged by fire.*

Three months later, on July 5, 1963, petitioners filed an action at law on the policy in the Second

Judicial District Court of the State of Nevada (R. 30), which action was removed to the United States District Court for the District of Nevada. On April 13, 1964, the Nevada District Court entered an order granting a stay of proceedings because of the pendency of the earlier Oregon action (R. 42).

Petitioners continued to demand a jury trial in the Oregon action; their wish was granted, a jury trial was had, and judgment was entered on the jury verdict in favor of respondent and against petitioners.

Thereafter, petitioners appealed to the United States Court of Appeals for the Ninth Circuit; the District Court judgment was affirmed by that body on June 9, 1967, and a petition for rehearing was denied August 1, 1967 (Br. 2).

Petitioners' instant appeal (Ninth Circuit No. 20099) was not the first encounter between these parties, on the instant facts, in that tribunal. Petitioners filed *three additional interim appeals* to the United States Court of Appeals for the Ninth Circuit: Ninth Circuit Nos. 19101, 19320 and 19323. Each of these petitions were dismissed by the Ninth Circuit.

REASONS FOR DENYING THE WRIT

Introduction

Petitioners' search for a writ of certiorari is one more step in a calculated plan of harassment of respondent. Petitioners present no valid reason for granting the writ.

Time and space permit no line-by-line refutation of the lengthy petition. Apparently petitioners did not benefit from the counsel of the Ninth Circuit regarding "extravagant multipication of assignments" and irrelevant argument and citation (See e.g., Pet. Br. A-2, A-3). Time will not warrant respondent's rebutting each assertion in petitioners' voluminous document.

I

The Federal District Court Correctly Decided all Issues of Law in Compliance with Oregon Jurisprudence

The Court instructed the jury, *inter alia*:

"Now I will outline the contentions of the parties here. Generally speaking, it is the plaintiff's contention, that is, the United Pacific Insurance Company, that at the time this application for insurance was made by Roger Chaney on the 16th of January he was acting as broker and agent for the defendants here in attempting to secure this insurance on this property rather than for the plaintiff, and that at the time of making this application to the plaintiff insurance company for this coverage he had knowledge that

this property had already been destroyed by fire, and that he wilfully concealed and did not disclose the fact to the insurance company at the time the application for the insurance was made.

"In other words, the plaintiff claims that Chaney under those conditions was acting as agent for the defendants and not as agent for the plaintiff.

"On the other hand, the defendants here, first of all, deny this and say that is not the fact. They state, in substance, that the fact was that on either the 30th or the 31st of October, 1962, Chaney, while acting within the scope of his authority as a solicitor—now, a solicitor is merely an agent, members of the jury, and he is called a solicitor so as to distinguish him under insurance law from a general agent, such as the Nelson Company—that he was a solicitor and agent of the Nelson Company, and that while acting within the scope and course of his authority he told Mrs. Arley that this property was covered by insurance; that the insurance company was the United Pacific Insurance Company, the plaintiff here; that the amount of insurance was fixed; and that the insurance was in effect as of that time.

"Now this, of course, is denied by the plaintiff, that there was any coverage as of that date."

The jury returned a verdict in favor of respondent and against petitioners upon questions of fact which affect no parties *aluinde* this action. While it is not unusual for parties to assert in some guise that they have been denied a right to trial by jury,

THIS IS THE FIRST INSTANCE WHERE PETITIONERS APPEAR TO BE COMPLAINING BECAUSE THEY *WERE* GRANTED THEIR JURY TRIAL.

Petitioners requested a jury trial (see e.g. Pet. Br. App. B. A-11); and they may not be heard to complain at this late date.

The petitioners were favored by the District Court instruction and cannot now complain. No recovery is permitted in Oregon upon an oral contract of fire insurance. *Salquist* v. *Oregon Fire Relief Association*, 100 Or. 416, 197 P. 312 (1921); *Mock, et al* v. *Glens Falls Indemnity Co.*, 210 Or. 71, 80, 309 P.2d 180 (1957). Nevertheless, the District Court submitted the issue to jury on the theory that they might find, under the evidence, that Mr. Chaney represented respondent in October, 1962, and that the policy issued subsequent to the fire loss was confirmation of the oral binder. The jury found for respondent. It is difficult to comprehend how petitioners have been harmed.

Petitioners apparently desire this Court to try fact questions *de novo* and overrule the jury verdict. There was ample evidence to support the verdict, pursuant to the appropriate instructions (Tr. 258-261).

At the time Mr. Chaney first handled insurance matters for petitioners, he was in no way connected with United Pacific Insurance Company (Tr. 59); the earlier coverage he obtained for the Arleys was

through companies other than respondent (Tr. 61, 62).

At the time of the dealings in question, Mr. Chaney had disposed of his own insurance agency, and was employed as a *solicitor* by the Larry Nelson Agency; Mr. Chaney's employer, Mr. Nelson, had specifically instructed Mr. Chaney that he could not write the coverage requested by the Arleys (Tr. 13, 70).

Mr. Chaney and the Nelson Agency represented many companies other than United Pacific (Tr. 9).

After the conversations between Mr. Chaney and the Arleys in 1962, Mr. Chaney attempted to broker the insurance coverage through other sources (Tr. 13, 70, 71, 124).[1] Mr. Chaney advised Mrs. Arley that he did not have a Nevada license and that he would attempt to broker the insurance for her (Tr. 105).

Mr. Chaney did not recall ever advising Mrs. Arley of the name of any particular company in which he would attempt to write the coverage (Tr. 68, 80, 81, 90). While this fact was disputed by Mrs. Arley, *it was a jury question determined adversely to petitioners.* Petitioners' statements throughout their

---

[1] An independent witness, Mr. John Smith, testified (Tr. 124) that Mr. Chaney had asked him if he could broker the fire coverage for him on the Nevada property; such testimony clearly established the fact that Mr. Chaney was not acting on behalf of respondent, but in fact was attempting to broker coverage through other companies on behalf of petitioners.

brief are patently unfair insofar as they fail to give any weight to the contested evidence where the jury found in respondent's favor.

Oregon has long held that a local insurance agent or a solicitor may act as an agent or broker on behalf of an insured. The thrust of the petition ignores this plain rule. For example, see *Hamacher* v. *Tumy*, 222 Or. 341, 347, 352 P.2d 493, 496 (1960); *Rodgers Insurance Agency* v. *Anderson Machinery*, 211 Or. 459, 468, 316 P.2d 497, 501 (1957). This rule applies even in the absence of specific statutory provisions for licensing brokers; such employment is merely a common-law principal and agent arrangement, with the insurance agent or solicitor acting as the insured's agent.

This proposition is hardly unique and is certainly consistent with the Nevada statutes, which provide that a policy may be negotiated by a nonresident-licensed agent or broker. NRS 684.350, 684.020(4). Never, when writing for United Pacific Insurance Company, had Mr. Chaney written insurance on Nevada properties without a Nevada license (Tr. 114-116). The issue is not whether or not an agent licensed in Oregon may write insurance on non-Oregon property. *The inquiry is whether or not a person so procuring insurance is acting as the agent of the company or as a broker for the insured.* The fact that Mr. Chaney and Mr. Nelson did not hold a nonresident agent's or broker's license in Nevada for United Pacific Insurance Company is evidence that Mr.

Chaney acted on behalf of the petitioners. The question of agency is a fact question for the jury. *Hardwick* v. *State Insurance Co.*, 20 Or. 547, 26 P. 840 (1891).

No contract of insurance was entered prior to the occurrence of the fire, so any policy subsequently issued, even if antedated, was void. The facts were undisputed that a fire loss occurred on January 16, 1963 (R. 54), and that Mrs. Arley knew of the loss and notified Mr. Chaney (Tr. 73). Mr. Chaney, with this knowledge, then attempted to effect antedated fire coverage to January 12, 1963, by ordering a policy from respondent (Tr. 76). Respondent had absolutely no liability under the alleged contract which was void *ab initio*. (It was not a renewal of an existing policy).

An agent has no authority to attempt to effect insurance upon property already destroyed, and a fire policy written after a loss is not a valid insurance contract. See *Gambleman* v. *Mercantile Insurance Company of America*. 90 F. Supp. 472 (S.D. Cal. 1950); *Celina Mutual Casualty Co.* v. *Baldridge*, 313 Ind. 198, 10 N.E.2d 904 (1937); *Hopkins* v. *Phoenix Fire Insurance Company*, 200 Ky. 365, 254 S.W. 1041 (1923). An agent of an insurer has no authority to bind the insurer by attempting to insure destroyed property. 16 Appleman, *Insurance Law and Practice* 703, § 9163; *Waterloo Lumber Company* v. *Des Moines Insurance Company*, 158 Iowa 563, 138 N.W. 504 (1912). See also *United*

States Casualty Co. v. *Rodrigues*, 288 S.W. 487 (Tex. Civ. App. 1926); *Clark* v. *Insurance Company of North America*, 89 Me. 26, 35 A. 1008 (1896); *Alliance Insurance Co.* v. *Continental Gin Co.*, 285 S.W. 257 (Tex. Comm. App. 1926); *Sholund* v. *Detroit Fire & Marine Insurance Co.*, 172 Wash. 111, 19 P.2d 395 (1933); *Royal Insurance Co., Ltd.* v. *Smith*, 77 F.2d 157 (9th Cir. 1935); *Ernest* v. *State*, 40 Ala. App. 344, 133 So. 2d 517 (1959).

Therefore, since there was no prior contract of insurance between the Arleys and respondent, no valid contract of insurance could have been entered subsequent to the fire loss.

Petitioners cite numerous inapposite cases and statutory provisions in support of their petition. Considerable reliance is placed upon *Mock, et al* v. *Glens Falls Indemnity Co.*, supra. It is to be noticed that the *Mock* court *found as a fact* that the agent intended to bind Glens Falls; apparently the agent only wrote for the single company. For that reason, the policy was reformed, 210 Or. at 80. Furthermore, in *Mock*, the company eventually covered the risk, 210 Or. at 81, whereas respondent could never cover petitioners' risk since the property had been previously destroyed.

Referring to the second beginning paragraph of Petitioners' Brief (Br. 6)) there is no stipulation or agreement that a solicitor and agent of United Pacific told Mrs. Arley that she was covered in United Pacific prior to the loss. The facts, determined by

the jury, are contrary. Mr. Chaney testified that he recalled no mention of a particular company. Mr. Chaney wrote for the Larry Nelson Agency, which in turn wrote insurance for several companies, including respondent. *Any facts with which the Arleys quarrel were found adversely to them.* Moreover, the solicitor binds *his principal, the agent,* according to the statute, ORS 736.005(3)(f); 736.410 (App. A). Thus the first sentence is fallacious and the terminology "sub-agent solicitor" is an unsupported legal conclusion. The fact question of whether or not Mr. Chaney was the agent for petitioners or respondent was decided favorably to respondent.

Respondent is unimpressed with petitioners' unwieldly summary of portions of the Oregon Insurance Law (Pet. Br. 8, et seq.), and is unable to find that *American Fire Insurance Company* v. *King Lumber and Manufacturing Company,* 250 U.S. 2, 39 S. Ct. 431, 63 L. Ed. 810 (1919), supports petitioners' statement. The enactment of a comprehensive code was intended, *inter alia,* to protect against false and fallacious claims. The cost of these claims are eventually borne by the premium-paying public.

The "intolerable judicial legislation" (Br. 11) is a figment of petitioners' imagination. The Federal District Court and the Ninth Circuit Court of Appeals correctly applied Oregon law and a jury determined the facts. Oregon's insurance statute is not "destroyed" by the decision and petitioners' sole objective is to have a rehearing on a fact question by

this Court. All that can be said for petitioners' position is that petitioners are outraged at the jury verdict and they want another chance. Neither the Ninth Circuit nor the District Court departed from normal procedures and no other parties are affected by the judgment.

To paraphrase petitioners' argument (Br. 13), not every litigant is in a position to harass insurance companies through a multitude of vexatious appeals. Despite the fact that petitioners have argued the merits of their case on this appeal, contrary to the accepted practice of this Court, respondent suggests that this tribunal should summarily dismiss the petition.

II

The Federal District Court and the Ninth Circuit Adhered to Customary, Recognized Judicial Procedure

Petitioners' second reason (Br. 13-18) is as frivolous as petitioners' earlier appeals. Apparently petitioners are not familiar with an action for declaratory judgment, the Federal Rules of Civil Procedure, or *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Having requested and received a jury trial, petitioners received their day in court and are entitled to nothing more.

It hardly requires citation of authority to establish that a declaratory judgment proceeding is a per-

missible and customary practice in Federal District Court and, in fact, in the Oregon state courts. See ORS Chap. 28.

The instructions of the Court clearly presented the issues for the jury to determine; no rights were denied petitioners and since oral contracts of fire insurance are not recognized in Oregon, no error prejudicing petitioners was committed. Petitioners can only lamely contend that they should have pursued a law action in Nevada. But they suffered no deprivation of right—they received, in essence, a law action with jury trial in Oregon, the situs of the first action.

Oregon was a proper forum. The action was first commenced in Oregon by respondent. Since 1958, the Arleys have resided in Portland, Oregon (Tr. 179) and Mr. Arley was employed in that city by the Montag Furnace Company (Tr. 180). Petitioners' automobiles were licensed in Oregon (Tr. 180) and Mr. Arley maintained a bank account in Portland (Tr. 181). Citizenship for purposes of diversity means domicile. *Seideman* v. *Hamilton*, 173 F. Supp. 641 (D. Pa. 1959). The domicile of the wife is normally that of the husband. *Seideman* v. *Hamilton*, supra; *Price* v. *Greenway*, 167 F.2d 196 (3rd Cir. 1948); Restatement, *Conflict of Laws* § 7 (1934).

Declaratory judgment procedure is *sui generis*. In compliance with the petitioners' demands, the trial court permitted a jury trial on all issues of fact. Petitioners now complain because the jury did not find

in their favor. The Court properly exercised its discretion in retaining jurisdiction in Oregon where the controversy was first litigated. This Court should not disturb such sound exercise of discretion. The principal parties, Mr. and Mrs. Arley, and the principal witnesses, Mr. Chaney, Mr. Nelson, Mr. John Smith, Mrs. Linda Upton, Mr. Robert Mohlere, and Mr. A. D. Reinhardt resided in the District of Oregon. Other than being the situs of the fire, Nevada had no nexus with the incident.

Petitioners persist in citing such cases as *Di Giovanni* v. *Camden Fire Insurance Association*, 296 U.S. 64, 56 S. Ct. 1, 80 L. Ed. 47 (1935), and *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379, 55 S. Ct. 310 (1935). (See, e.g., Br. 16). These decisions do not assist petitioners. Insofar as they are *rendered prior* to the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and the enactment of the Federal Rules of Civil Procedure, they are outmoded. Apparently they are premised upon some "federal equity common law." The petitioners received substantial justice and the decision below should not be disturbed.

Because of the vexatious and harassing tactics of petitioners, respondent should be awarded costs and attorneys' fees on this appeal, under the authority of *In re Midland United Co.*, 141 F.2d 692 (3rd Cir. 1944), and *Russell* v. *Cunningham*, 233 F.2d 806 (9th Cir. 1956).

CONCLUSION

The petition for writ of certiorari should be denied and judgment should be entered for a reasonable attorneys' fee in favor of the respondent.

Respectfully submitted,

KENNETH E. ROBERTS
Standard Plaza,
Portland, Oregon 97204
Of Attorneys for Respondent
United Pacific Insurance
Company